

1 Lawrence J. Gornick (SBN 136290)  
2 Debra DeCarli (SBN 237642)  
**LEVIN SIMES KAISER & GORNICK LLP**  
3 44 Montgomery Street, 36<sup>th</sup> Floor  
San Francisco, CA 94104  
4 Telephone: (415) 646-7160  
Fax: (415) 981-1270  
[lgornick@lskg-law.com](mailto:lgornick@lskg-law.com)  
[ddecarli@lskg-law.com](mailto:ddecarli@lskg-law.com)

6 Bruce W. Blakely (SBN 106832)  
7 **FLAXMAN & BLAKELY, AN ASSOCIATION**  
8 591 Redwood Highway, Suite 2275  
Mill Valley, CA 94941  
Telephone: (415) 381-6650  
9 Fax: (415) 381-4301  
[bruce@brucewblakely.com](mailto:bruce@brucewblakely.com)

10 Attorneys for Plaintiffs

12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 PETER JAY GERBER AND MIRIAM  
15 GOLDBERG,

Case No: 3:07-cv-05918-JSW

16 Plaintiffs,

17 vs.  
18 BAYER CORPORATION AND BAYER  
HEALTHCARE PHARMACEUTICALS,  
INC.; BMC DIAGNOSTICS, INC.;  
19 CALIFORNIA PACIFIC MEDICAL  
CENTER; GENERAL ELECTRIC  
COMPANY; GE HEALTHCARE, INC.; GE  
20 HEALTHCARE BIO-SCIENCES CORP.;  
McKESSON CORPORATION; MERRY X-  
RAY CHEMICAL CORP.; and DOES 1  
21 through 35

**PLAINTIFFS' REPLY TO REMOVING  
DEFENDANTS' OPPOSITION TO MOTION  
FOR REMAND**

Date: January 11, 2008  
Time: 9:00 a.m.  
Courtroom: 2

**JURY TRIAL DEMANDED**

23 Defendants.

25  
26 Removing Defendants have failed to meet their burden of proving that Plaintiffs have no  
possible cause of action against any of the four non-diverse Defendants. Additionally, Removing  
27

1 Defendants have advanced an illusory argument in support of their request for this court to defer  
 2 ruling on Plaintiffs' remand motion. Plaintiffs' Motion for Remand should be granted.

3           **A. Removing Defendants Have Not Met Their Burden of Proof.**

4           To determine its jurisdiction, the Court need not decide whether Plaintiffs can prove a legally  
 5 cognizable claim against the non-diverse defendants, but only that they have pled one under state  
 6 law. *Schultz v. Astrazeneca Pharmaceuticals, L.P.*, 2006 LEXIS 94534, \*7 (Case No. C 06-6681  
 7 CW, N.D.Cal. 2006) (citing *Briggs v. Lawrence*, 230 Cal. App. 3d 605, 610, 281 Cal. Rptr. 578  
 8 (1991)). The removal statute is strictly construed against removal jurisdiction. See *Becraft v.*  
 9 *Ethicon*, 2000 U.S. Dist. LEXIS 17725, \*6 (Case No. C 00-1474 CRB, N.D.Cal. 2000) (citing *Gaus*  
 10 *v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (noting that jurisdiction "must be rejected if there is any  
 11 doubt as to the right of removal in the first instance")). Removing Defendants always have the  
 12 burden of proving that removal is proper. (See *id.*) (noting that there is a "strong presumption"  
 13 against removal jurisdiction).

14           In the present case, Removing Defendants allege that the four California defendants are all  
 15 fraudulently joined. Accordingly, Removing Defendants bear the burden of proving that Plaintiffs  
 16 cannot prevail on a single cause of action against any of the four California defendants. *Plute v.*  
 17 *Roadway Package Sys., Inc.*, 141 F.Supp.2d 1005, 1008 (N.D. Cal. 2001); see also *Schultz*, 2006  
 18 LEXIS 94534 at \*12-13 (holding that defendant failed to show that there was no possibility that  
 19 plaintiffs would be able to establish liability against non-diverse defendant in state court). Any  
 20 disputed factual issues, any ambiguities in state law, and any doubts arising from inartful, ambiguous  
 21 or technically defective pleading must be resolved in favor of remand. *Plute*, 141 F.Supp.2d 1005;  
 22 see also *Maher v. Novartis Pharmaceuticals Corp.*, 2007 U.S. Dist. LEXIS 58984, \*6 (Case No.  
 23 07852, S.D.Cal. 2007). A finding that any of Plaintiffs' claims is colorable against any one of the  
 24 four California defendants is sufficient to mandate a remand to San Francisco Superior Court. *Plute*,  
 25 141 F.Supp.2d 1005; see also *Schultz*, 2006 LEXIS 94534, \*7.

1           **B. Plaintiffs' Have Pled a Colorable CLRA Cause of Action Against Each of the**  
 2           **California Defendants. Removing Defendants' Arguments Regarding Lack of**  
 3           **Notice are Frivolous.**

4           Removing Defendants insist that Plaintiffs' CLRA claims are barred for lack of notice. But,  
 5           in their CLRA cause of action, Plaintiffs consciously and intentionally sought equitable relief only.  
 6           (*Complaint ¶¶ 120-122.*) The CLRA's notice provisions apply only to actions for damages. Cal. Civ.  
 7           Code § 1782(a). An action for injunctive relief pursuant to the Consumer Legal Remedies Act may  
 8           be commenced without providing notice. Cal. Civ. Code § 1782(d) ("An action for injunctive relief  
 9           brought under the specific provisions of Section 1770 may be commenced without compliance with  
 10          subdivision (a)").

11          Defendants also make the plainly erroneous argument to the effect that Plaintiffs' CLRA  
 12          claim fails because they missed a thirty day deadline to amend the complaint to seek damages. But,  
 13          there is no statutory requirement that Plaintiffs must amend their pleading within thirty days to  
 14          request damages. The law simply allows an amendment seeking damages "not less than 30 days after  
 15          the commencement of an action for injunctive relief". Cal. Civ. Code § 1782(d). Whether and when  
 16          to file such an amendment is discretionary, not mandatory. The relevant language is as follows:

17           "(d) An action for injunctive relief brought under the specific  
 18          provisions of Section 1770 may be commenced without compliance with  
 19          subdivision (a). Not less than 30 days after the commencement of an  
 20          action for injunctive relief, and after compliance with subdivision (a), the  
 21          consumer may amend his or her complaint without leave of court to  
 22          include a request for damages. The appropriate provisions of (b) or (c)  
 23          shall be applicable if the complaint for injunctive relief is amended to  
 24          request damages."

25          Plaintiffs' CLRA cause of action against the non-diverse defendants is colorable.

26           **C. Plaintiffs Have Pled a Colorable Negligence Cause of Action Against Each of the**  
 27           **California Imaging Facility Defendants. Removing Defendants' Argument That**  
 28           **They are Immune From Liability Is Frivolous.**

In essence, Removing Defendants argue that no corporate medical facility can ever be held liable for negligence. They offer no support for this novel proposition because there is none. In fact, Defendants' position runs directly counter to settled California law. "[A] hospital is negligent if it does not use reasonable care towards its patients. A hospital must provide procedures, policies, facilities, supplies and qualified personnel reasonably necessary for the treatment of its patients." Judicial Council of Cal., Civil Jury Instns. (2006) CACI No. 514. (citing *Vistica v. Presbyterian Hospital & Medical Center, Inc.* (1967) 67 Ca.2d 465, 469, 62 Ca.Rptr. 577, 432 P.2d 193; *Rice v. California Lutheran Hospital* (1945) 27 Cal.2d 296, 302, 163 P.2d 860.)

Under this standard, Plaintiffs' complaint clearly pleads a colorable negligence claim against the Imaging Facility Defendants. Plaintiffs' complaint alleges, among other things, that the Imaging Facility Defendants negligently marketed and sold their MRI and MRA facilities and services, which included gadolinium based contrast agents used in connection with MRIs and MRAs (*Complaint ¶ 86*); Plaintiffs' complaint also alleges that "[t]he Imaging Facility Defendants subjected Mr. Gerber to MRIs and MRAs using gadolinium-based contrast agents" (*Complaint ¶ 81*); "[t]he Imaging Facility Defendants knew or should have known that administering MRIs and MRAs using gadolinium-based contrast agents to patients with Impaired renal function, such as Plaintiff, posed a serious risk of bodily harm to such patients" (*Complaint ¶ 82*); and "[t]he Imaging Facility Defendants breached their duty of care to Plaintiff by failing to correctly ascertain, assess and account for Plaintiff's renal function prior to subjecting Plaintiff to MRIs and MRAs and by failing to adequately communicate to Plaintiff the warnings, instructions, risks, dangers and side effects of receiving MRIs and MRAs using gadolinium-based contrast agents." (*Complaint ¶ 85.*)

The Imaging Facility Defendants' corporate status does not immunize them from liability for their own acts of negligence. Additionally, they are liable for the negligence of the physicians who use their facilities. "A hospital is liable to a patient under the doctrine of corporate negligence for negligent conduct of independent physicians and surgeons who, as members of the hospital staff, avail themselves of the hospital facilities, but who are neither employees nor agents of the hospital." *Elam v. College Park Hospital*, 132 Cal. App. 3d 332, 335 (1982). Removing Defendants' have

1 failed to meet their burden to establish that there is no possibility that Plaintiffs may prevail on their  
 2 negligence cause of action against the Imaging Facility Defendants.

3           **D. The Issue of Whether the Distributor Defendants Can Be Liable Under**  
 4           **California Law Must Be Resolved in Favor of the Plaintiffs.**

5           The declarations in support of Removing Defendants' Opposition acknowledge that  
 6 McKesson and Merry X-Ray, both California residents for diversity purposes, distributed Omniscan  
 7 and Magnevist. (See Lawson Decl. ¶ 2.) (Pulito Decl. ¶ 3.) Defendants represent to this Court that  
 8 remainds of cases involving pharmaceutical distributors are a "glaring exception" confined to rulings  
 9 of the Central District. This representation does not withstand scrutiny. In addressing whether  
 10 distributors of prescription drugs are sham defendants, courts in the Northern, Southern, Eastern and  
 11 Central Districts of California have concluded that they are not shams due to the fact that under  
 12 California law, a distributor of prescription drugs could possibly be liable for failure to warn. See  
 13 *Maher*, 2007 U.S. Dist. LEXIS 58984, \*6; *Aaron v. Merck & Company, Inc.*, 2005 U.S. Dist. LEXIS  
 14 40745, \*8 (Case No. CV 05-4073-JFW C.D. Cal. 2005) (defendant failed to meet heavy burden of  
 15 demonstrating that there is no possibility that plaintiffs will be able to prevail); *Black v. Merck &*  
 16 *Company, Inc.*, 2004 U.S. Dist. Lexis 29860, \*6 (Case No. 038730 C.D. Cal. 2004) (remanding a  
 17 pharmaceutical products liability case in which McKesson Corp. was a defendant; defendant failed to  
 18 meet heavy burden to show "absolutely no possibility" that plaintiffs could prevail); *Martin v. Merck*  
 19 & *Company, Inc.*, 2005 U.S. Dist. LEXIS 41232 (Case No. S-05-750 E.D. Cal. 2005) (defendant  
 20 failed to meet heavy burden to show to a near certainty that cause of action is precluded under  
 21 California law); see also *Becraft*, 2000 U.S. Dist. LEXIS 17725, \*6 (concluding that a distributor can  
 22 be liable under California law for defective sutures).

23           The Distributor Defendants are indisputably non-diverse. Plaintiffs have pled colorable  
 24 causes of action against them. Any disputed facts or ambiguities in state law must be resolved in  
 25 favor of remand. *Plute*, 141 F.Supp.2d 1005, 1008; *Maher*, 2007 U.S. Dist. LEXIS 58984, \*6  
 26 (remanding a pharmaceutical products liability case in which McKesson Corp. was a defendant)  
 27 (citing *Little v. Purdue Pharma, LP*, 227 F. Supp. 2d 838, 849 (S.D. Ohio 2002) ("a federal court  
 28

1 should hesitate before pronouncing a state claim frivolous, unreasonable, and not even colorable in an  
 2 area yet untouched by the state courts.")).

3       **E. None of Plaintiffs' Causes of Action are Barred by the Statute of Limitations.**

4       Without any basis, Removing Defendants argue that the statute of limitations began to run on  
 5 Plaintiffs' claims in 1997, and therefore, all of Plaintiffs' claims are time barred. (See Defendants'  
 6 *Opposition* 6:10-20.) Defendants' assertions are meritless.

7       First, Plaintiffs' complaint does not allege that Mr. Gerber's injury occurred in 1997 and  
 8 nothing on the face of the complaint shows that Plaintiffs' claims are barred by any statute of  
 9 limitations. Defendants essentially concede this point when they argue that "[p]laintiffs should have  
 10 pled... the date Mr. Gerber contracted NSF..." (*Defendants' Opposition* 8:12-13.) Therefore, there is  
 11 no basis for a finding that any of Plaintiffs' claims are barred.

12       Second, under no circumstances could it be possible for Plaintiffs' CLRA claims to be time  
 13 barred due to the fact that in their CLRA cause of action, Plaintiffs seek to enjoin Defendants from  
 14 engaging in current and on-going conduct. (*Complaint* ¶¶ 120-123.)

15       Finally, even if Plaintiffs had pled that Mr. Gerber's injury had occurred more than two years  
 16 prior to filing of the complaint, the discovery rule would clearly apply to delay accrual. The case of  
 17 *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4<sup>th</sup> 797 (2005), cited by Removing Defendants, is  
 18 instructive on the issue. In *Fox*, the California Supreme Court found that the Plaintiff had failed to  
 19 adequately plead facts sufficient to withstand demurrer because she failed to allege specific facts  
 20 supporting the general allegation that she could not have discovered the cause of her injury within the  
 21 limitations period. (*Id.* at 811.) But here, Plaintiffs have done precisely that. In support of their  
 22 allegation that the cause of Mr. Gerber's injuries was not and could not have been discovered until a  
 23 time less than two years before the filing of the complaint (*Complaint* ¶ 67), Plaintiffs allege:  
 24 "Defendants have repeatedly and consistently failed to advise consumers and/or their doctors of the  
 25 causal relationship between gadolinium-based contrast agents and NSF in patients with renal  
 26 insufficiency." (*Complaint* ¶ 61.) "It was not until September 2007 that Bayer and GE sent letters to

1 healthcare providers warning them of the risk of NSF to kidney impaired individuals who received  
 2 MRIs using gadolinium-based contrast agents." (*Complaint ¶ 62.*)

3 Further, in *Fox*, the court held that because it was apparent that the deficiencies in the  
 4 complaint could be cured, the plaintiff should be given leave to amend her complaint to make the  
 5 appropriate allegations. Similarly here, it is clear that plaintiffs could cure any deficiencies with  
 6 respect to accrual simply by citing GE's own public statement that the linkage of NSF to gadolinium  
 7 based contrast agents was not known to the medical community, and there was no report of the link  
 8 in the world's published literature, until 2006. (See Ex. C. pp. 3-4, to Decl. of Debra DeCarli in  
 9 Support of Motion for Remand (GE Position Paper)). Because any pleading deficiencies with respect  
 10 to the discovery rule could be easily cured by amendment, any doubts arising from inartful,  
 11 ambiguous or technically defective pleading must be resolved in favor of remand. *Plute*, 141  
 12 F.Supp.2d 1005; see also *Maher*, 2007 U.S. Dist. LEXIS 58984, \*6.

13 Defendants should not be allowed to publicly pronounce that the link between their  
 14 gadolinium based contrast agents and NSF was unknown to them and the entire medical community  
 15 until 2006 and to then take the position here that Plaintiffs should have discovered the link at an  
 16 earlier time.

#### 17 F. The Court Should Not Defer Ruling on Remand

18 Removing Defendants urge this court to ignore the fact that there is no basis for federal  
 19 jurisdiction in this case and to stay proceedings pending transfer to a non-existent MDL. Removing  
 20 Defendants' argue that "absent a stay, there is a distinct possibility of inconsistent rulings by different  
 21 federal district courts on virtually identical remand issues." (*Defendants' Opposition* 2:16-17.) This  
 22 argument does not withstand scrutiny for at least two reasons. First, there is only one other case  
 23 involving remand issues possibly subject to MDL coordination. (*Id.* at 2:9-12.) Second, none of the  
 24 remand issues in that other case will be remotely similar, let alone identical, to the remand issues  
 25 present here. The other case was filed in Louisiana state court. (*Id.*) The only non-diverse  
 26 defendants are healthcare facilities. (*Id.* at 13.) As should be obvious from the briefs filed by the  
 27 parties in connection with removal and remand of the present case, the issues here are all based on  
 28

1 California substantive and procedural law, namely: Do California statutes of limitation bar all of  
2 plaintiffs' claims? Have plaintiffs adequately pled facts to delay accrual under California's discovery  
3 rule? Does the CLRA (California's Consumer Legal Remedies Act) notice provision apply to bar  
4 plaintiffs CLRA claims? Does California law allow a failure to warn claim against a distributor of  
5 prescription drugs? Are plaintiffs' claims against the Facility Defendants made not viable by  
6 operation of California law? Because none of the issues arising in connection with a remand motion  
7 in a case filed in a Louisiana state court will be similar to the issues present here, there is no risk of  
8 inconsistent rulings. Consequently, the basis for Defendants' request for a stay is illusory. This court  
9 should decide the remand issue.

10 **CONCLUSION**

11 Removing Defendants have failed to establish that Plaintiffs have ***no possible claim*** against  
12 ***any of the four*** California defendants. Therefore, they have failed to meet their burden of proving  
13 that each of them is fraudulently joined. Accordingly, this matter must be remanded because  
14 complete diversity of citizenship is lacking.

15 Dated: December 28, 2007

16 LEVIN SIMES KAISER & GORNICK LLP

17 By: s/ Lawrence J. Gornick  
18 Lawrence J. Gornick, Esq.

1 Lawrence J. Gornick (SBN 136290)  
2 Debra DeCarli (SBN 237642)  
2 **LEVIN SIMES KAISER & GORNICK LLP**  
3 44 Montgomery Street, 36<sup>th</sup> Floor  
4 San Francisco, CA 94104  
5 Telephone: (415) 646-7160  
Fax: (415) 981-1270  
lgornick@lskg-law.com  
ddecarli@lskg-law.com

6  
7 Bruce W. Blakely (SBN 106832)  
FLAXMAN & BLAKELY, AN ASSOCIATION  
8 591 Redwood Highway, Suite 2275  
Mill Valley, CA 94941  
9 Telephone: (415) 381-6650  
Fax: (415) 381-4301  
bruce@brucewblakely.com

10  
11 Attorneys for Plaintiffs

12  
13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA**

16 PETER JAY GERBER AND MIRIAM ) Case No.: 3:07-cv-05918-JSW  
17 GOLDBERG, )  
18 Plaintiffs, )  
19 vs. )  
20 BAYER CORPORATION AND BAYER )  
21 HEALTHCARE PHARMACEUTICALS, INC.; )  
22 BMC DIAGNOSTICS, INC.; )  
23 CALIFORNIA PACIFIC MEDICAL CENTER; )  
24 GENERAL ELECTRIC COMPANY; GE )  
25 HEALTHCARE, INC.; GE HEALTHCARE )  
26 BIO-SCIENCES CORP.; )  
27 McKESSON CORPORATION; MERRY X- )  
RAY CHEMICAL CORP.; and DOES 1 through )  
35, )  
Defendants. )

) **PROOF OF SERVICE**

1  
2 I certify that I am over the age of 18 years and not a party to the within action; that my business  
3 address is 44 Montgomery Street, 36<sup>th</sup> Floor, San Francisco, CA 94104; and that on this date I served a  
4 true copy of the document(s) entitled:  
5

**PLAINTIFFS' REPLY TO REMOVING DEFENDANTS' OPPOSITION TO MOTION FOR  
REMAND**

6 Service was effectuated by forwarding the above-noted document in the following manner:

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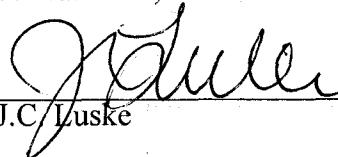
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15 Executed on December 28, 2007 at San Francisco, California.  
16

17   
18 J.C. Luske